NOVA SCOTIA COURT OF APPEAL
Citation: *R.B.N. v. M.J.N.*, 2003 NSCA 65

Date: 20030611
Docket: CA 188819
Registry: Halifax

Between:

R.B.N.

Appellant

v.

M.J.N.

Respondent

Judges:	Glube, C.J.N.S.; Bateman and Saunders, JJ.A.
Appeal Heard:	June 4, 2003, in Halifax, Nova Scotia
Held:	Appeal dismissed per reasons for judgment of Bateman, J.A.; Glube, C.J.N.S. and Saunders, J.A. concurring.
Counsel:	Myrna L. Gillis, for the appellant B. Lynn Reierson, for the respondent

Reasons for judgment:

[1] R.B.N. applies for leave to appeal and, if granted, appeals the "emergency interim access order" granted by Justice Douglas C. Campbell of the Supreme Court, Family Division.

[2] The appellant and respondent, M.J.N. separated March 25, 1999. A divorce judgment issued August 9th, 2002. They have two children, a son, V. born March ..., 1991 (*editorial note- date removed to protect identity*) and a daughter, N. born October ..., 1994 (*editorial note- date removed to protect identity*).

[3] The couple have had a long and bitter history since their separation in May of 1999. Ms. N. has a firmly held belief that, since their separation, Mr. N. has sexually abused N. and physically abused V. Mr. N. steadfastly denies that such has occurred. Ms. N. has taken the position that any access exercised by Mr. N. must be supervised. Consensual resolution of the issues corollary to divorce has, therefore, been very difficult. Until recently, Mr. N. has agreed to supervision of his access in order to maintain contact with the children.

[4] Many medical professionals and other experts have been involved with the children and with the family as a whole. It has not been conclusively established that the children, and in particular N., have been abused. There are no concrete physical findings pointing to abuse. Some experts believe that sexual abuse is likely to have occurred, others are not convinced. There has not, to date, been a judicial finding of abuse.

[5] In April of 2002, a seven day custody trial was scheduled to be heard before Justice Campbell. At the commencement of that proceeding it became clear that the single impediment to the settlement of all issues was Ms. N.'s insistence that supervision of Mr. N.'s access continue. After lengthy preliminary discussions between the parties, facilitated by Justice Campbell, an arrangement was reached whereby a panel of three experts would assess the progress of the access which would, by agreement, be supervised for the present. Mr. N. consented to the continuing supervision, although his eventual goal was to normalize his access to the children. The parties agreed on all other corollary issues and the trial was averted. At the conclusion of the discussions, it was agreed that the parties would work out the detailed wording of the corollary relief judgment.

[6] As the parties were unable to agree on the wording, Mr. N., who is self-represented, asked to appear again before Justice Campbell to finalize the judgment.

[7] During the summer of 2002, Ms. N. explored employment prospects in Georgia. In late August she discussed with Mr. N. the theoretical possibility of her moving to Atlanta with the children. Both parties are American citizens who emigrated to Canada some years ago in conjunction with their connection to the Buddhist community here. Ms. N. believed that a move back to the United States would be financially and educationally advantageous for her and the children. V. has special needs. He has a rare autistic like syndrome and requires special schooling and medical treatment. In Ms. N.'s view, the American educational system provides significant advantages for such students which are not available in Canada. It was Mr. N.'s position that such a move would only be practicable if he could exercise unsupervised access with the children. The distance would require block access. Supervision of such access on a twenty-four hour a day, seven day a week basis would be costly and impracticable if not impossible to arrange. At the time of the discussion, Mr. N. did not know that the move was a certainty. A few days later, without Mr. N.'s knowledge, Ms. N. moved to Atlanta with the children. She is now established there in a lucrative job and is in a relationship with another man with whom she plans to live or is now living.

[8] Mr. N.'s application to fix the form of corollary relief judgment came before Justice Campbell on September 17, 2002. At that hearing the judge was advised that Ms. N. had left the jurisdiction. Mr. N., who was represented by counsel at that hearing, requested an order for immediate return of the children. Counsel for Ms. N. advised that it was her understanding that the parties were there, that day, to deal with the access variation requested by her client. In preparation for leaving Ms. N. had applied for a variation of the access. That application was not launched until the eve of the move, September 5th, and the documents not served upon Mr. N. until September 6th by which time Ms. N. and the children had left for Atlanta, Georgia.

[9] The matter was procedurally complicated in that no corollary relief judgment had been issued. At the September 17th appearance the judge first proceeded to finalize the corollary relief judgment in consultation with the parties. He declined to issue an order that day requiring return of the children but set the matter over to October 4th, making it clear to all that he would have limited time in his docket on that date. The judge noted that sufficient time for a full custody and access hearing would not be available for about 13 months.

[10] On October 4th, after reviewing the affidavits and hearing the submissions of counsel, the judge, providing oral reasons, declined to direct return of the

children to Nova Scotia but ordered that Mr. N. have block access to the children without the requirement of supervision, save for the first six months of access when such would be exercised with the general presence in the home of Mr. N.'s common law partner, D. R.. The details of the block access were to be the subject of submission by the parties following which the judge would issue the order. On December 18, 2002 Justice Campbell filed a written decision, expanding upon his oral reasons, as he had indicated that he would do at the time of delivering his oral judgment, and fixing the details of the access. The order issued on December 23, 2002.

[11] On November 4, 2002, Ms. N. filed a notice of appeal from the decision of Justice Campbell, and applied in this Court for a stay of his order, insofar as it removed the requirement that access be supervised. In a decision released December 24, 2002, (**N. v. N.**, 2002 NSCA 165; (2002), 210 N.S.R. (2d) 179), Justice Oland declined to order the stay.

[12] While Justice Campbell had limited time to deal with the applications before him, it is important to note that he was the judge who heard the parties in April at which time he was fully familiar with the affidavits on file and the expert reports. Due to time constraints, the oral evidence at the October hearing was limited to cross-examination of the parties. In his oral and written decisions, however, the judge demonstrated a command of the issues at hand and the documentary evidence before him.

[13] Justice Campbell's initial oral decision refers, in some detail, to a number of the experts' reports. He was well aware of the differing opinions on the alleged abuse, which issue he recognized as central to his assessment of the risk to the children. In deciding to remove the order for supervision the judge concluded:

> ... I cannot say with any certainty that it [the abuse] did not happen but I can say with a great deal of comfort that it is much more likely that it didn't happen than that it did.

[14] The appellant alleges a number of errors in process and result. In essence, Ms. N. urges us to find that Justice Campbell was wrong in removing the provision for supervision of access.

[15] This Court will not interfere with a discretionary, interlocutory order, unless wrong principles of law have been applied or patent injustice would result. (**Exco Corp. v. Nova Scotia Savings & Loan Co.** (1983), 59 N.S.R. (2d) 331; N.S.J. No. 98 (A.D.), per MacKeigan, C.J. for the Court at p.333).

[16] In **Pumphrey v. Pumphrey** (1997), 29 R.F.L. (4th) 283; N.J. No. 60 (Q.L.)(Nfld.C.A.) the court reviewed the test to be applied on the appeal of an interim custody order:

> 2 Before dealing with the substance of the seven grounds of appeal, it is appropriate to enunciate briefly the principle applicable on an appeal of an interim order. In *Sypher v. Sypher* (1986), 2 R.F.L. (3d) 413 (Ont C.A.), Zuber J.A. at p. 413 summarized the position in the context of an appeal of an interim order for support when he said:
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> > [I]nterim orders are intended to cover a short period of time between the making of the order and trial. I further observe that interim orders are more susceptible to error than orders made later; but the purpose of the interim order is simply to provide a reasonably acceptable solution to a difficult problem until trial.
> >
> > At trial, after a full investigation of the facts, a trial judge may well come to the conclusion that a substantially different order should be made. I gather that there is a fear that the interim order may acquire such an aura of propriety that there will be a tendency to repeat the terms after trial. This is not so. The trial judge's discretion is unfettered and his judgment will be rendered on a full investigation of the facts.
> >
> > Having those principles in mind then, an appellate court should not interfere with an interim order unless it is demonstrated that the interim order is clearly wrong and exceeds the wide ambit of reasonable solutions that are available on a summary interim proceeding.
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> 3 In *M.(S.R.) v. M.(J.K.)* (996), 24 R.F.L. (4th) 286 (Man. C.A.), Helper J.A. of the Manitoba Court of Appeal expressed the principle, in the context of custody orders, as follows:
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> > Interim custody orders ought not to be varied in the absence of compelling evidence which calls out for a change in the short term. To ignore this principle is to cause needless disruption for the children who are the subjects of those orders.

[17] I would endorse the above comments as applicable to the review of such orders. Where the order is of an emergency interim nature, as is the case here, the argument in favour of appellate restraint is even more compelling.

[18] This was an emergency interlocutory order. Ms. N., in surreptitiously removing the children from the jurisdiction, precipitated the urgency. While she was not in technical breach of a custody order by so doing, given the protracted and acrimonious nature of these proceedings, the fact that only supervised access could be exercised by Mr. N., and taking into account that the parties had, only a few months prior to the move, put into effect a plan to monitor the need for supervision, it could have come as no surprise to her that Mr. N. would seek immediate relief from the court. There is no merit to Ms. N.'s submission that the manner in which this hearing proceeded amounted to a denial of natural justice.

[19] We are not free, absent error, to substitute our own assessment of risk to the children for that of the trial judge. I would find nothing in the thorough and thoughtful decisions of Justice Campbell reflective of error. Justice Campbell's assessment of the evidence and the conclusions that he drew from it are supportable on the record. I am satisfied that he was fully cognizant of the expert evidence before him (see ¶ 13, above).

[20] In his decision Justice Campbell invited the parties to consider agreeing that his access order be made final. They apparently did not agree to do so. The matter should, therefore, have been set for a further hearing in the Family Division. It was incumbent upon the parties to make that arrangement. The appellate court is not the appropriate forum in which to resolve the ongoing issues surrounding access. Justice Campbell's order has now been in place for five months. Presumably, Mr. N. has exercised access. The children have been living in Atlanta. This Court has no evidence before it as to the family's current circumstances. Such evidence should be presented through the usual process in the trial court.

[21] Accordingly, while I would grant leave, I would dismiss the appeal. This is an appropriate case for an award of costs in favour of Mr. N. In view of the fact that he was self represented for a portion of this proceeding, although retaining counsel for the hearing, I would fix those costs at $1500.00 inclusive of disbursements.

Bateman, J.A.

Concurred in:

Glube, C.J.N.S.
Saunders, J.A.